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Supreme Court of the United States

October Term 1941.

No. 499.

MEMPHIS NATURAL GAS COMPANY,
Appellant,

vs.

ROY H. BEELER, Attorney-General of the State of Tennessee, et al.,

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Appeal From The Supreme Court of The State of Tennessee.

BRIEF FOR THE APPELLEES.

ROY H. BEELER,
Attorney-General of Tennessee;
W. F. BARRY,
Assistant Attorney-General,
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BAIRD-WARD—NASHVILLE

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Supreme Court of the United States

October Term 1941.

No. 499.

MEMPHIS NATURAL GAS COMPANY,
Appellant,

vs

ROY H. BEELER, Attorney-General of the State of Tennessee, et al.,
Appellees.

Appeal from the Supreme Court of the State of Tennessee, December Term 1940, Opinion not published—(Contained in the Record at pp. 371-389), the Opinion on the Petition to Rehear, appears in the Record, p. 400.

BRIEF FOR THE APPELLEES.

Appellees have heretofore filed a statement opposing jurisdiction and a motion to dismiss the appeal for want of a substantial federal question. No useful purpose could be served by restating this motion here. However, appellees rely and insist thereon, and in no sense abandon that position.

Additions to Appellant's Statement of the Case.

In order to avoid any possible confusion as to the exact facts of this case, we feel it necessary to make certain additions to Appellant's Statement, and in a sense to restate the case.

Appellant is a Delaware corporation, with its principal offices in Memphis, Tennessee. (R., pp. 60, 137, 149.) It maintained a transfer office in New York City, and a statutory office in Delaware, but no business was transacted at either of these offices. (R., p. 44.) All business of appellant was transacted in the Tennessee office. (R., pp. 44, 149.)

It delivered gas to two corporations in Tennessee—the West Tennessee Power & Light Company, and the Memphis Power & Light Company. (R., p. 39.) The first corporation distributed gas to consumers (R., p. 550); the second distributed, in partnership or joint association with appellant, some of the gas which it took, and it consumed a substantial volume of the gas itself in its electric generating plant at Memphis, Tennessee. (R., p. 540.)

Deliveries of the gas were made by appellant at ten widely separated places in Shelby County, Tennessee, and at seven widely separated places in West Tennessee. (R., p. 39.) Before delivery was made in Tennessee, the pressure of the gas was reduced from the main line pressure to a certain specified pressure (R., p. 50) and in this, the Tennessee operation drastically differed from appellant's methods of

delivery in Mississippi and other States. (R., p. 49.) In States other than Tennessee, purchasers tapped appellant's line and took gas—this gas was taken at whatever pressure happened to be in the time, and appellant did nothing to the gas to effect delivery. (R., p. 49.)

In Tennessee, Appellant maintained a dispatcher, who controlled the input of gas in the Louisiana fields, and the pressure at all times to suit the requirements of the local Tennessee market. (R., pp. 42, 43.)

Appellant had two contracts with the Memphis Power & Light Company. One of these was a Buyer and Seller Contract, wherein the appellant sold and delivered gas, on demand, upon orders received in its Memphis, Tennessee, office, to the buyer for consumption in its electric generating plant at Memphis (R., pp. 76, 86, 164); the other contract was one of partnership, or joint enterprise—appellant agreed to deliver gas to the Memphis Power & Light Company, in Memphis, for distribution there. The gas was delivered in whatever volume the market required at the time of delivery, appellant's Memphis office being advised hourly as to the requirements of the market. (R., pp. 42, 43.)

The gas was delivered at a price determined by the use to which the gas was put by the burner-tip user, and this price was ascertained by a reading of the meters in each individual burner-tip user's home, place of business, plant, etc., there being five different classifications fixed by the contract. (R., p. 59.)

A monthly statement was made between the parties based upon the amount of gas furnished for the various uses and at the varied prices fixed for such uses, but these monthly statements were not final. At the end of the year when the profits and losses had been determined from the distribution of natural gas in Memphis and Shelby County, Tennessee, these profits or losses were divided between the two parties, as provided in the contract. (Exhibit "A" to Johnson, Clause 1, R., pp. 509, 460; Explanatory Note, Exhibit "C"—2-3, 4-5, to Binswanger, R., pp. 424, 441, 50, 58.)

Appellant, when organized in 1928, had no business outside Tennessee. Subsequently, certain public utility companies tapped appellant's lines in Louisiana, Arkansas and Mississippi. However, the bulk of appellant's business is still done in Tennessee. During the years in question in this case, appellant's business done in Tennessee with the Memphis Power & Light Company constituted the following percentages of the total business done by appellant:

1932, 83.24%; 1933, 83.08%; 1934, 81.47%; 1935, 80.06%. (R., p. 85.)

The business done with the West Tennessee Power & Light Company during the years in question amounted to only about one or two per cent. The percentage of appellant's business represented by sales direct to consumers, on demand, in Tennessee (the electric generating plant of the Memphis Power & Light Company, at Memphis), was as follows:

1932, 33.49%; 1933, 33.22%; 1934, 27.78%; 1935, 24.34%. All of the remaining business done by appellant in Tennessee was done in partnership with the Memphis Power & Light Company. (R., p. 86.)

All orders for gas were received by appellant in Memphis; all disbursements; all banking and other business, including the lending of money, the purchase of oil well shares, and other activities, were carried on there. The president of the appellant lived in Memphis, and conducted the entire business of the corporation in that city.

The original tax assessment in this case was made on April 24, 1938, and the measure used was the net earnings of appellant from all sources for the years 1932, 1933 and 1934. This assessment was in the amount of $57,156.83. Thereafter, on June 9, 1938, a corrected assessment was made in the amount of $54,179.31 for the years 1932, 1933, 1934 and 1935. This reduced assessment was made upon the basis of appellant's statement of earnings in Tennessee for those years and it excluded all earnings arising from business done outside Tennessee and it is the latter amount, with interest, recovered in this case. (R., p. 583.)

At the time of appellant's organization, twenty-five (25%) per cent of its capital stock was gratuitously given to Electric Bond and Share Company, and appellant is a registered subsidiary of this holding company in the reports filed with the Securities and Exchange Commission. The supplier of gas to appellant, United Gas Company, and all corporations which were supplied gas by appellant, both

inside and outside Tennessee, were subsidiaries of Electric Bond and Share Company. At all times since its organization appellant has had one or more common Directors with one of these Electric Bond and Share Company subsidiaries.

Summary of Argument.

(1) The tax sought to be collected from appellant is an excise, franchise or privilege tax, levied on corporations and joint stock associations, foreign or domestic, for the privilege of engaging in business in Tennessee in corporate form. It is in no sense a tax on the general doing of business in Tennessee, and relates only to corporations or joint stock associations which derive their life and right to do business in Tennessee from the sovereign legislative powers of Tennessee. The tax measure is three per cent (3%) of the net earnings of the taxpayer from business done wholly within Tennessee, and all other privilege taxes are allowed as credits upon the tax. Therefore, the statute obviously could not be a burden on, or regulation of, interstate commerce. (*Infra*, pp. 8-10.)

(2) Appellant, a Delaware corporation, with its legal, commercial and business domicile in Tennessee, conducted a local business in Tennessee; it sold gas to consumers in Tennessee, on demand, upon orders received in its Memphis office; it distributed natural gas in Tennessee to burner-tip users or consumers, in partnership or association with its corporate affiliate. (*Infra*, pp. 10-13.)

(3) Only those net earnings which arose from business done wholly within Tennessee were used as a measure of the tax. Under the circumstances, we contend that the imposition of the corporate privilege or franchise tax for admittedly exercising corporate powers in Tennessee, measured by the amount of business done in Tennessee, did not constitute an undue burden on interstate commerce, but only affected it remotely or incidentally, if at all. (*Infra*, pp. 13-16.)

(4) There is no decision of this Court to the contrary; and certain apparently adverse statements in some decisions which were not relevant on the facts of the case, were made without reference to a situation such as this. (*Infra*, pp. 16-18.)

(5) Principles relating to the power of Congress to regulate interstate commerce generally, are inapplicable. The question is whether a particular exercise of the State's power to tax, in view of its nature and operation, presents any obstacle to the execution of the national policy. (*Infra*, pp. 18-20.)

ARGUMENT.

The Appellee's position in this case is that considering the matter either upon broad and substantial commerce questions, or upon narrow doctrinaire legalistic theories, the case presents no substantial federal question.

The Nature of the Tennessee Excise Tax and Its Incidence.

(1) This tax statute accords all corporations that do business in Tennessee, equal treatment, and is in no sense a tax barrier. No discrimination is made in favor of intrastate commerce. The statute taxes all corporations and joint stock associations, foreign or domestic, which do business in Tennessee, and then measures the amount of the tax by three per cent (3%) of the net earnings from the business done wholly within Tennessee. (Sec. 1316-18 Code of Tennessee.)

This tax, on its face, of course, does not violate any provision of the federal constitution. (*Coverdale* v. *Arkansas-Louisiana Pipeline Company*, 303 U. S., 604; *Henneford* v. *Silas Mason*, 300 U. S., 557; *Southern Natural Gas Co.* v. *Alabama*, 301 U. S., 148; *Western Livestock Assn.* v. *Bureau of Revenue*, 303 U. S., 250; *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S., 33.)

A state is at liberty to levy a non-discriminatory privilege tax upon corporations doing business in such state, and there is no federal requirement that a state favor interstate commerce over intrastate commerce. This is true in the

absence of Congressional action; and at the time covered by this suit, the Natural Gas Act had not been passed, and Congress had not asserted the national power to regulate interstate transportation of natural gas through the Federal Power Commission.

The Supreme Court of Tennessee, in construing the tax here involved, has said:

> "In *Flint* v. *Stone Tracy Co.*, 220 U. S., 151, 31 Sup. Ct., 342, 55 L. Ed., 389 Ann. Cas., 1912B, 1312, the court said the tax may be described as an excise upon the particular privilege of doing business in the corporate capacity; i. e., with the advantages that arise from the corporate or *quasi*-corporate organization. We think this properly characterizes the tax levied by the act in controversy."
>
> *Bank of Commerce & Trust Co.* v. *Senter*, 149 Tenn., 569, at p. 583 of the opinion.

Further in the same opinion, the Court uses this language:

> "The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade." At page 587 of the opinion.

Surely, as construed by the Tennessee Court, the statute meets all requirements of the commerce clause of the Federal Constitution.

The Nature of Appellant's Business, and the Application of the Tennessee Excise Tax to That Business.

(2a) Appellant sold gas to the Memphis Power & Light Company for consumption in its electric generating plant at Memphis. This gas was delivered on orders received hourly in appellant's Memphis office. That this is a local business, was determined by this Court in *Southern Natural Gas Corp.* v. *Alabama*, 301 U. S., 148.

On the whole, there is no difference between the business of appellant and the Southern Natural Gas Company concerning this consumption contract; and when speaking of this business, appellant's president, Mr. Johnson, said:

> "Then there is the Southern Natural Gas Company that brings gas from the Monroe fields into the East into Birmingham and Atlanta. Well they are in the same—much the same in the nature of its business to ours." (R., p. 121.)

Appellant tries to distinguish this case from the Southern Natural Gas Corporation case, upon the legalistic and technical ground that in the Southern Natural Gas Company case the Court predicated tax liability upon the fact that short service lines were installed by the Seller to deliver the gas to the Purchaser; whereas, in the present case, it claims no such lines were installed. This Court recently declined to accept such a narrow view of the case, however.

See the case of *Illinois Natural Gas Co.* v. *Central Illinois Public Service Commission, et al.* (decided January 5, 1942, No. 100, October Term, 1941), where Mr. Chief Justice Stone interprets the decision in the Southern Natural Gas Corp. case, thus:

> "In *Southern Natural Gas Corp.* v. *Alabama*, 301 U. S., 148, 156-57, on which the Illinois Supreme Court relied, we held only that the sale of gas to a local industrial consumer by one who was piping the gas into the state was a local business sufficient to sustain a franchise tax on the privilege of doing business within the state, measured by all of the taxpayer's property located there, including that used for wholesale distribution of gas to local public service companies."

The clear meaning of this interpretation is that it is the nature of the business carried on, rather than any legalistic or technical detail which controls. The decision in *Southern Natural Gas Corp.* v. *Alabama, supra,* was forecast by the opinion in *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S., 465, and *Missouri, ex rel. Barrett* v. *Kansas Natural Gas Co.,* 265 U. S., 298, in which latter case this language occurs:

> "The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance."

Appellant's Partnership, or Joint Enterprise, with the Memphis Power & Light Company in Distributing Gas to Burner-Tip Users in Tennessee.

(2b) Appellant and the Memphis Power & Light Company jointly distributed gas to burner-tip consumers in Memphis. The appellant brought the gas into Tennessee, turned it over to the Memphis Power & Light Company for retail distribution, was paid for the gas upon the basis of the measurement made at the point of delivery to the burner-tip user, and then at the end of each calendar year the appellant and the Memphis Power & Light Company divided the profits or losses from this particular business.

The Supreme Court of Tennessee held this to be a joint enterprise sufficient to this phase of the business to use those earnings arising therefrom as a measure of the tax. The Court said:

> "It is not necessary to determine when title to the gas passed to the Memphis Power & Light Company, or whether title ever actually passed. If title passed, then, still the business in distributing to consumers was for and on behalf of both these development and operating corporations, the Memphis Natural Gas Company was engaged through its co-operative in intrastate business in Tennessee."

As a striking illustration of the soundness of the holding of the Tennessee Court, let us say that the appellant accused the Memphis Power & Light Company of creating a fictitious reserve at one time, and contended that this reserve was actually net profits from the distribution of gas in

Memphis, to which appellant was entitled to fifty per cent (50%). The Memphis Power & Light Company claimed that this was a replacement, or depreciation reserve. The matter could not be adjusted amicably and the Memphis Natural Gas Corporation filed suit against its partner, or joint *entrepreneur*, on account of the profits of the gas distribution business in Memphis, and relied upon the clause in the contract for the division of profits and losses as the basis of its suit. The suit was compromised and settled in favor of the appellant and it received over a quarter of a million dollars as its share of this fund created by the joint distribution of gas in Memphis.

The Chief Engineer of appellant was asked what was necessary for appellant to do to effect this distribution of gas to consumers in Memphis, and he replied "It is necessary for us to keep in touch with the requirement of the various markets from hour to hour, and to operate our stations and our lines to suit the conditions that prevail at any time." (R., pp. 42, 43.)

It is perfectly apparent from all of the above that appellant carried on a local business in Tennessee which subjected its net earnings to use as a measure of its tax liability.

Only Those Earnings Arising from Business Done Wholly in Tennessee Were Used as a Measure of the Tax.

(3) The earnings of appellant from business done outside Tennessee were excluded, and the earnings used as a measure of tax in this case arose from business done wholly

within Tennessee with the Memphis Power & Light Company and the West Tennessee Power & Light Company.

The judgment entered in the Supreme Court of Tennessee is an agreed judgment as to amount, the appellant conceding at the time the judgment was entered that if any tax was due, the sum was correctly set out.

Under the circumstances, we contend that the imposition of this tax for engaging in a local business in Tennessee did not constitute a burden on interstate commerce, nor amount to a regulation of such commerce; but if it did affect it at all, the effect was remote and incidental.

The taxing authorities in this case followed the opinion of the Supreme Court of Tennessee in *Bank of Commerce* v. *Senter, supra.* The Court said (p. 588):

> "The tax laid upon the privilege of conducting business as a corporation within the State is graduated upon the result of the exercise of the privilege. . . .
>
> ". . . Measuring the tax by net earnings from business done in the State is not discriminatory, because it excludes from the measure those earnings of foreign corporations, which cannot be taxed, and then classifies all corporations both domestic and foreign on the same basis." [Equality is the theme—cf. *Henneford* v. *Silas Mason, supra.*]

In *Hump Hair Pin Mfg. Co.* v. *Emmerson,* 258 U. S., 290, the Court in sustaining the Illinois franchise tax, commented upon the statute as according "exactly equal treatment of foreign and domestic corporations of like character."

Generally speaking, a State may not levy a tax which directly burdens interstate commerce. However, the mere fact that a tax indirectly or incidentally affects interstate commerce, does not constitute a burden on it.—See *Hump Hair Pin Mfg. Co.* v. *Emmerson, supra* (at p. 294 of the opinion), where this rule is enunciated:

> ". ... While a state may not use its taxing power to regulate or burden interstate commerce, . . . on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal Constitutional rights. . . . The turning point of these decisions is whether, in its incidence, the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon, it, or whether it affects it only incidentally or remotely, so that the tax is not in reality a burden, although in form it may touch, and in fact, distantly affect, it."

If we concede, for the sake of argument, that appellant was engaged to some extent in interstate commerce, then, under the facts of the present case the tax only remotely and incidentally affected interstate commerce. This Court, in the recent case of *McGoldrick* v. *Berwind-White Coal Mining Co., supra,* observed:

> "It is not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of the State tax burdens."

When the facts of this case are considered in the light of the decisions of this Court, it is apparent that there is no substantial federal question involved. In the first place, the appellant's earnings used as a measure of tax arose from intrastate business; and if we admit, for the purpose of discussion, that those earnings came indirectly from interstate commerce, then the tax only remotely or incidentally affected such commerce. The Tennessee Excise Tax as applied to the appellant in its incidence fell upon the local business of distributing gas to consumers and burner-tip users in the State of Tennessee, upon demand, on orders received in the Memphis office of appellant.

No Decision of This Court Is Contrary to the Result Reached by the Supreme Court of Tennessee.

(4) The chief case relied on by the appellant as controlling is *State Tax Commission* v. *Interstate Natural Gas Co.*, 284 U. S., 41. This case did not concern a franchise or excise tax, and was properly distinguished by this Court in *Southern Natural Gas Co.* v. *Alabama, supra.*

The Mississippi pipeline tax involved in the Interstate Natural Gas Co. case, was a tax that was levied "upon each person engaging, and/or continuing in this State in the business of operating a pipe line, or transporting in or through this State, oil or natural or artificial gas through pipes, and/or conduits, as follows:"

The Interstate Natural Gas Company had no office in Mississippi, did not deliver gas, on demand, in that state,

neither billed nor collected for the gas delivered in that state from any point in Mississippi; and as remarked by Chief Justice Hughes, in *Southern Natural Gas Corp.* v. *Alabama*, at p. 156 of the opinion, the case "rested upon the conclusion that what was done was wholly incidental to interstate commerce between Louisiana and Mississippi. There were no such local activities as are present here to carry the transactions of the company into the field of State authority."

Subsequent to the decision in the Interstate Natural Gas Company case, Mississippi passed an excise, or franchise tax on corporations. The Interstate Natural Gas Company again asserted its non-liability for taxation in Mississippi, and upon the same agreed statement of facts, liability was imposed by the Circuit Court of Appeals, which reversed a three Judge Federal Court holding contrary in Mississippi (103 Fed. (2d), 544), and petition for *certiorari* was granted by this Court (*Stone* v. *Interstate Natural Gas Co.*, 307 U. S., 620). Thereafter, in a *per curiam* opinion, the judgment of the Circuit Court of Appeals was affirmed by this Court upon the authority of *Southern Natural Gas Co.* v. *Alabama, supra.* (308 U. S., 522.)

It is indeed difficult to see what direct bearing *Ozark Pipeline Co.* v. *Monier*, 266 U. S., 555; or *State Tax Commission* v. *Interstate Natural Gas Co., supra*, have on this case.

In the *Ozark Pipeline Company* case, oil was neither received nor delivered in Missouri, and nothing was done

there except in the furtherance of transportation. This case as well as the *Interstate Natural Gas Company* case, are properly distinguished from a case such as the present one, by the Court in *Southern Natural Gas Corp.* v. *Alabama*, *supra*.

The Imposition of the Tennessee Excise Tax on Appellant Does Not Interfere with the Execution of Any National Policy.

(5) The principles relating to the power of Congress to regulate interstate commerce generally, are inapplicable in this case. No interference with the execution of the national policy is presented here; first, because the tax in its incidence falls upon a local business; and second, if the tax in any way affects interstate commerce, it does so only remotely and incidentally.

Again, if we accept appellant's premise, for the sake of debate, that its business has some interstate commerce features, this, of course, would not withdraw its earnings from the field of state taxation. This Court has for some time recognized the proposition that the mere fact that the flow of interstate commerce is subject to the regulating power of Congress does not necessarily mean that a state may not tax such business property or transactions connected with that flow. In *Minnesota* v. *Blasius*, 290 U. S., at p. 8 of the opinion, it is said:

> "The question, it should be observed, is not with respect to the extent of the power of Congress to regulate commerce, but rather whether a particular exer-

cise of the state's power, in view of its nature and operation, must be deemed to be in conflict with this paramount authority."

And again: In *Federal Compress & Warehouse Co.* v. *McLain*, 291 U. S., 17, Mr. Justice Stone said (p. 23):

"'. . . the mere extension of control over a business by the National Government does not withdraw it from a local tax which presents no obstacle to the execution of the national policy."

"(Cf. *Susquehanna Power Co.* v. *Tax Commission, supra; Broad River Power Co.* v. *Query, supra;* See *Willcutts* v. *Bunn*, 282 U. S., 216, 226, 230, 75 L. Ed., 304, 307, 309, 51 Sup. Ct., 125, 71 A. L. R., 1260.)"

This answers the appellant's contention that it is not subject to Tennessee taxation because the Federal Power Commission has assumed jurisdiction over its business; and here it might be said also that the Natural Gas Act was not passed until the tax in question had accrued.

The above quotations also distinguish the case of *Public Utilities Commission of Kansas* v. *Landon*, 249 U. S., 236, relied on by appellant, from the case at bar.

In the very recent case of *Illinois Natural Gas Co.* v. *Central Illinois Pub. Serv. Com., et al., supra*, Mr. Chief Justice Stone had occasion to discuss this proposition; and it is evident, from the opinion in that case, that the Court did not depart from the contention of the appellees here.

CONCLUSION.

Tennessee afforded the opportunity to appellant to have any net earnings whatever; it afforded the market; its Government afforded the protection for this enterprise; the earnings came from Tennessee; the business competed with other Tennessee enterprises which paid their proportionate share of the cost of Tennessee Government; to allow appellant to avoid its just share of the tax burden would be to discriminate against other local businesses in Tennessee. There is no obstacle to taxation of appellant, contained in the decisions of the Supreme Court of the United States construing the commerce clause.

All of the earnings of appellant here used as a measure of tax, arose from intrastate business conducted wholly within the State of Tennessee.—

(1) It sold gas to the Memphis Power & Light Company (under the electric generating plant contract) to a consumer wholly within Tennessee, on demand, upon orders received in appellant's principal office in Memphis.

(2) Appellant engaged in selling gas to consumers wholly within Tennessee, in partnership or joint enterprise with its corporate affiliate, Memphis Power & Light Company.

Practically the entire earnings of appellant arose from business done wholly within Tennessee, and all of the earn-

ings here used as a measure of tax came directly from local business done wholly within Tennessee.

Respectfully submitted,

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P. 5

SUPREME COURT OF THE UNITED STATES.

No. 499.—October Term, 1941.

Memphis Natural Gas Company, Appellant, *vs.* Roy H. Beeler, Attorney General of the State of Tennessee, et al.	Appeal from the Supreme Court of the State of Tennessee.

[March 30, 1942.]

Mr. Chief Justice Stone delivered the opinion of the Court.

The question for decision is whether a tax laid pursuant to §§ 1316-1318 of the Tennessee Code of 1932 upon the Memphis Natural Gas Company's net income derived from sales of natural gas in Tennessee, during the years 1932 to 1935, violates the commerce clause.

The case comes here by appeal from a judgment of the Supreme Court of Tennessee, which sustained the tax and reversed a decree of the Tennessee chancery court enjoining its collection. Appellant contends that the case is properly an appeal, under section 237(a) of the Judicial Code as amended, 28 U. S. C. § 344(a), because the validity of the Tennessee statute as applied to the facts of this case has been drawn in question. Cf. *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282. But appellant's bill of complaint, filed in the chancery court, alleged only that the assessment of the tax and the threatened levy violated its rights under the commerce clause. Our decisions have long since established that an attack upon a tax assessment or levy, on the ground that it infringes a taxpayer's federal rights, privileges or immunities, will not sustain an appeal under section 237(a). *Jett Bros. & Co.* v. *City of Carrollton*, 252 U. S. 1; *Miller* v. *City of Denver*, 290 U. S. 586; *Baltimore National Bank* v. *State Tax Commission*, 296 U. S. 538; *Irvine* v. *Spaeth*, No. 596 this Term, decided October 13, 1941. It is not enough that an appellant could have launched his attack upon the validity of the statute itself as applied; if he has failed to do so we are without jurisdiction over the appeal. The Judi-

cial Code was intended to restrict our obligatory appellate jurisdiction to a narrow class of cases, and to foreclose an appeal as of right whenever the prescribed conditions have not been rigorously fulfilled.

It is true that when this case reached the Supreme Court of Tennessee the appellant included in its brief, which has been certified as part of the record here, a statement of its legal position which might serve as a challenge to the validity of the statute. But appellant has failed to establish that under Tennessee practice such a contention can be availed of if advanced for the first time in the appellate court, cf. *Penn. R. Co.* v. *Ills. Brick Co.*, 297 U. S. 447, 462-63; *Jacobi* v. *Alabama*, 187 U. S. 133, 135-36; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, and appellant's burden is to show affirmatively that we have jurisdiction. *Chicago, Indianapolis etc. Ry. Co.* v. *McGuire*, 196 U. S. 128, 132; cf. *Lynch* v. *New York*, 293 U. S. 52, 54-55; *Enriquez* v. *Enriquez* (*No. 2*), 222 U. S. 127, 130; *Brady* v. *Terminal Railroad Assn.*, 302 U. S. 678.

The first opinion rendered by the Supreme Court of Tennessee made no mention of any federal question, and in a supplemental opinion the court stated only that "the claim of federally protected right was decided adversely to complainant". Since it does not appear that the validity of the statute was either drawn in question or passed upon in the trial court or deemed by the state supreme court to be in issue, we must dismiss the appeal for want of jurisdiction. Treating the papers on which the appeal was allowed as a petition for writ of certiorari, as required by section 237(c) of the Judicial Code as amended, 28 U. S. C. § 344(c), certiorari is granted and we proceed to consider the merits of the case.

Taxpayer, a Delaware corporation, was engaged during the period in question in the business of purchasing natural gas in Louisiana and transporting it through its pipeline to points in Tennessee where it delivered the gas into the pipelines of two distributing companies—Memphis Power & Light Co. and West Tennessee Power & Light Co.—which sold the gas to local consumers. Taxpayer sells some of its gas in other states, but in Tennessee it sells from 1 to 2% of its output to the West Tennessee Power & Light Co. and delivers 80% or more to the Memphis company. That company distributes it to consumers under a contract with taxpayer which the Supreme Court of Tennessee has

found to be a joint undertaking of the two companies whereby taxpayer furnishes gas from its pipeline, the Memphis company furnishes facilities and service for distribution and sale to consumers, and the proceeds of the sale, after deduction of specified costs and expenses, are divided between the two companies.

Taxpayer is licensed by the State of Tennessee to do business there. It maintains a statutory office in Delaware and a stock transfer office in New York City, but conducts no business at either. It manages its business from its office in Memphis, Tennessee, where it keeps its accounts, provides for the payroll of employees on its line in Tennessee and other states, and prepares and sends out bills for gas delivered in Tennessee and other states. It has thus established a commercial domicile in Tennessee by virtue of which it is subject to taxation there upon its intangibles, unless such taxation infringes the commerce clause. *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193.

Section 1316 of the Tennessee Code of 1932 imposes on all foreign and domestic corporations doing business for profit in the state an annual excise tax of "three per cent. of the net earnings for their preceding fiscal year . . . arising from business done wholly within the state, excluding earnings arising from interstate commerce." The Supreme Court of Tennessee sustained the tax on the ground that it was laid on appellant's net earnings from the distribution of gas under its contract with the Memphis company, which distribution it held not to be interstate commerce within the meaning of the statute. It decided that by virtue of their contract the companies became in effect partners or joint enterprisers in the distribution and sale of the gas to Tennessee consumers, the net earnings from which are taxable under the statute.

On petition for rehearing, taxpayer asked a modification of the decree on the ground that included in the measure of the tax were profits derived from sales of gas to the West Tennessee Power & Light Co. and from certain other sales to the Memphis company, not under the joint adventure agreement, which it was insisted were concededly sales in interstate commerce. The court rejected this contention upon the adequate state ground, not challenged here, that taxpayer had failed to show what portion, if any, of the taxed profits was derived from such sales and consequently had laid no basis for an injunction restraining collection of that part of the tax.

This Court has often had occasion to rule that the retail sale of gas at the burner tips by one who pipes the gas into the state or by a local distributor acquiring the gas from another who has similarly brought it into the state is subject to state taxation and regulation. *Public Utility Comm.* v. *Landon*, 249 U. S. 236; *East Ohio Gas Co.* v. *Tax Comm'n.*, 283 U. S. 465; *Southern Gas Corp.* v. *Alabama*, 301 U. S. 148, 154; cf. *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 309; *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. —. It follows that if the Supreme Court of Tennessee correctly construed taxpayer's contract with the Memphis company as establishing a profit-sharing joint adventure in the distribution of gas to Tennessee consumers, the taxpayer's net earnings under the contract were subject to local taxation.

The meaning and effect of the contract, so far as they establish taxpayer's participation in and ownership of profits derived from the retail sale of the gas, are local questions conclusively settled by the decision of the state court save only as this Court, in the performance of its duty to safeguard an asserted constitutional right, may inquire whether the decision of the state question rests upon a fair or substantial basis. See *Broad River Co.* v. *South Carolina*, 281 U. S. 537, and cases cited. We examine the contract only to make certain that the non-federal ground of decision is not so colorable or unsubstantial as to be in effect an evasion of the constitutional issue.

The contract was entered into as a preliminary to the award by the City of Memphis to the Memphis company of its franchise to distribute gas to consumers, and execution of the contract was a condition of the grant of the franchise. By the contract the Memphis company undertook to establish its distribution system. Taxpayer undertook to construct its pipeline with facilities, including measuring stations at a delivery point, for supplying the Memphis company with a varying flow of gas into the service pipes as and when required by the Memphis company for consumer needs. The amount so furnished, less certain deductions covered by a separate contract not now material, was to be divided into five classes, according to the use made of the gas by consumers, and was to be billed by taxpayer to the Memphis company at five different specified rates. The amount of gas allocated to each class was to be in proportion to the amount of that class of gas sold by the Memphis company for like use during the preceding month.

At the end of each year the combined net surplus or deficit of the two companies was to be divided between them by a cash settlement. The surplus or deficit of each was to be arrived at by deducting from its gross revenues the operating costs, costs of property restorations and replacements, taxes, amortization of investment, and 6% upon investment. After all net deficits of both parties had been made up and the Memphis company had received from the combined net surpluses 1½% of its total investment annually, any additional combined net income was to be paid to or retained by taxpayer.

The contract provided for readjustment from time to time of the billing price of the gas supplied by taxpayer so as to admit of reduction in the rates to consumers, after first allowing "a reasonable return" on taxpayer's investment. The contract contains the usual provisions for inspection of books by the parties and the city, and a clause requiring all notices to be given to taxpayer at its Memphis office.

The Supreme Court of Tennessee held that the city was a party to the contract entitled to the benefits of its provisions for rate reductions. It held that the circumstance that taxpayer and the Memphis company were designated by the contract as "seller" and "buyer" did not alter or obscure the fact that taxpayer was a participant in the profits derived from the joint undertaking and that the precise time when the title to the gas passed, if it passed before distribution to consumers, was immaterial. In any case it thought that the tentative amounts to be paid by the Memphis company for the gas in the first instance were to be determined after delivery by the use made of it by consumers.

We cannot say that there is not a substantial basis for the state court's conclusion that in substance the contract called for the contribution of the services and facilities of the companies to a joint enterprise, the taxpayer's delivery of gas into the mains of the Memphis company for distribution to consumers, and a division between the two companies of the operating profits after providing for certain agreed initial costs and expenses. Nor can we say that by this participation the taxpayer did not do such a business in the state that the profits derived from it are not an appropriate measure of the tax.

Taxpayer's contribution to the joint undertaking with the Memphis company for the distribution of gas to local consumers, and

its activities at its Memphis general office in supplying gas to be distributed for the joint account as required by the Memphis company and in safeguarding and securing payment of its share of the profits, went beyond the mere sale, to a distributor, of gas in interstate commerce. It also constituted participation in the business of distributing the gas to consumers after its delivery into the service pipes of the Memphis company. *Cheney Bros. Co.* v. *Massachusetts*, 246 U. S. 147, 155-56; *Atlantic Lumber Co.* v. *Commissioner*, 298 U. S. 553; *Southern Gas Corp.* v. *Alabama, supra.* Since it was competent for the state to tax such business done within it, it was competent to measure the tax by the net earnings of the business as well as by the capital employed. See *Southern Gas Corp.* v. *Alabama, supra*, 156-57.

In any case, even if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there, cf. *Wheeling Steel Corp.* v. *Fox, supra*, or upon net income derived from within the state, *Shaffer* v. *Carter*, 252 U. S. 37, 57; *Wisconsin* v. *Minnesota Mining Co.*, 311 U. S. 452; cf. *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, is not prohibited by the commerce clause on which alone taxpayer relies. *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 119-30; cf. *Bass, etc., Ltd.* v. *Tax Comm.*, 266 U. S. 271; *Western Live Stock Co.* v. *Bureau*, 303 U. S. 250, 255. There is no contention or showing here that the tax assessed is not upon net earnings justly attributable to Tennessee. *Underwood Typewriter Co.* v. *Chamberlain, supra*; cf. *Bass, etc., Ltd.* v. *Tax Comm., supra*; *Butler Bros* v. *McColgan*, 315 U. S. —. It does not appear that upon any theory the tax can be deemed to infringe the commerce clause.

Appeal dismissed for want of jurisdiction. Certiorari granted and judgment affirmed.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.